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No. 99-2023

Supreme Court, U.S.
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In The

Supreme Court of the United States

LORI ANN HORNER, by and through her father nfr Haskell Horner, JULIANA BROWN, by and through her father nfr Michael Brown, JACQUELINE ELSTON, by and through her father nfr Joseph Elston, and MARY CHRISTINE WHITELOCK, an adult,

Petitioners,

v.

KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION and THE KENTUCKY STATE BOARD FOR ELEMENTARY AND SECONDARY EDUCATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT KENTUCKY HIGH SCHOOL ATHLETIC ASSOCIATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Kentucky High School Athletic Association does not accept Petitioners' description of the questions presented by their Petition for Writ of Certiorari (hereafter, "Petition"). A more appropriate description is as follows:

The primary question raised in the Petition is whether the United States Court of Appeals for the Sixth Circuit erred in holding that Petitioners failed to make a *prima facie* showing that Respondents violated Title IX of the Educational Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987 (20 U.S.C. § 1681, *et seq.*), by their adoption of a gender-neutral policy which required 25% of the member schools of the KHSAA to express an interest in participating in a sport before the KHSAA would "sanction" the particular sport.

The secondary question raised by the Petition is two-fold and should be stated as follows:

(i) Assuming the United States Court of Appeals for the Sixth Circuit erred in holding that Petitioners failed to make a *prima facie* showing of a Title IX violation, whether the standard for recovery of compensatory damages is that of discriminatory animus or deliberate indifference; and

(ii) Even if the standard for recovery of monetary damages is deliberate indifference, whether the United States Court of Appeals for the Sixth Circuit erred in holding that Petitioners failed to meet their burden of proof.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petition accurately identifies parties to this proceeding. Petitioners fail to note, however, that this action was consolidated with another matter pending in the United States District Court for the Western District of Kentucky, captioned, *Carrie F. Olin, et al. v. Jefferson County Board of Education*, No. C-92-0323 L(M). Further, during the course of this proceeding, another party, Nancy J. Wehr, by and through her parents, William J. Wehr and Nancy J. Wehr, intervened in order to assert interests of slow-pitch softball players.

There is no parent or publicly held company owning 10% or more of the Kentucky High School Athletic Association.

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COUNTERSTATEMENT OF THE CASE

A. The Parties

Respondent Kentucky High School Athletic Association (hereafter, "KHSAA") is a voluntary unincorporated association consisting of approximately 286 public, private and parochial high schools within the Commonwealth of Kentucky. The KHSAA was organized in 1917 by the principals of several schools for the purpose of developing and regulating high school athletics in Kentucky.

Pursuant to Ky.Rev.Stat.Ann. § 156.070(1) (Michie 1996), Respondent the Kentucky State Board for Elementary and Secondary Education (hereafter, "State Board") is vested with the authority to manage interscholastic athletics in the common schools of the Commonwealth of Kentucky. Subject to certain restrictions, the State Board may delegate management of interscholastic athletics to an agent. Ky.Rev.Stat.Ann. § 156.070(2) (Michie 1996). At all times relevant to this action, the KHSAA has served as the designated agent of the State Board for this purpose.

Petitioners are four adult females. At the time this action was filed, all Petitioners except Mary Christine Whitelock[1] were enrolled in various public high schools and middle schools in Kentucky. The common thread binding Petitioners as plaintiffs was their claimed interest in having Respondents sponsor girls' fast-pitch softball.[2]

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[1] Whitelock was an adult who had already graduated from high school.

[2] At the time this action was instituted, the KHSAA had sanctioned a state tournament for schools participating in slow-pitch softball for approximately ten years. While a number of

B. The Nature Of Petitioners' Claims

Petitioners' original Complaint included claims for alleged violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, Title IX of the Educational Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987 (20 U.S.C. § 1681, *et seq.*), as well as other state statutory and constitutional claims. Petitioners sought declaratory relief, injunctive relief, compensatory damages, punitive damages and attorneys' fees based on their assertions that Respondents had discriminated against them on the basis of their gender by refusing to "sanction" the sport of girls' fast-pitch softball.[3] Petitioners' allegation of discrimination rested on their argument that fast-pitch softball was the female equivalent of boys' baseball, and that Respondents' refusal to "sanction" the sport placed them at a disadvantage in competing for college athletic scholarships. Petitioners further asserted that the KHSAA discriminated against

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member schools played fast-pitch softball in 1992, the KHSAA did not sanction a state tournament until 1995 because less than 25% of its membership had expressed an interest in participating in that sport.

[3] The term "sanction" as used herein, in Petitioners' Complaint and in subsequent pleadings does not mean that KHSAA member schools were prohibited from competing in interscholastic sports for which the KHSAA does not sponsor a state tournament. In fact, a number of schools engage in such competition. Instead, the term relates solely to post-season championship play. Thus, while the KHSAA did not "sanction" post-season play for fast-pitch softball prior to 1995, its member schools did participate and compete with other members in that sport.

them by "sanctioning" ten sports for males but only eight sports for females.

The KHSAA defended the action on several grounds. Initially, the KHSAA established that it had not "sanctioned" girls' fast-pitch softball because of a policy that a state tournament would not be held unless 25% of its members expressed an interest in participating in the particular sport (hereafter, "the 25% rule"). In fact, a KHSAA survey taken in 1988 indicated only 9% of its member schools were interested in "sanctioning" fast-pitch softball for post-season play. A similar survey was conducted in 1992 with only 17% of KHSAA member schools expressing an interest in sanctioning fast-pitch softball – well below the 25% threshold.

Next, the KHSAA established that females were able to compete in any "male" sports (*i.e.*, wrestling, football and baseball) for which corresponding female teams were not offered. In addition, as noted in footnote 2, the KHSAA established that its member schools were not prohibited from competing interscholastically in sports for which it did not sponsor a state tournament. That is, its member schools were free to field fast-pitch softball teams and compete with one another even though the KHSAA did not sponsor a state tournament. Finally, the KHSAA challenged application of Title IX principles to it as well as Petitioners' claims that Title IX violations had been shown.

C. The District Court's Original Grant Of Summary Judgment And The Sixth Circuit's Subsequent Remand For Further Proceedings

The KHSAA initially moved for summary judgment on the grounds that it had not violated Petitioners' civil rights and was not subject to Title IX because, as an entity, it did not receive federal funds. This Motion was granted on January 14, 1993. (See Appendix A, Petition for Cert., p. 85a.) On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's grant of summary judgment on Petitioners' Equal Protection claim. *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994) (hereafter *"Horner I"*). (See Appendix C, Petition for Cert., p. 59a.) This holding was based upon the fact that Petitioners had failed to offer any proof of intentional discrimination by Respondents. *Id.* at 276. (See Appendix C, Petition for Cert., pp. 80a-82a.)

Regarding Petitioners' Title IX claim, the Sixth Circuit initially concluded that the KHSAA was subject to Title IX as an indirect recipient of federal funds because it received membership dues from member schools, some of which, in turn, receive federal funding.[4] The court then

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[4] This part of *Horner* has been implicitly overruled by *NCAA v. Smith*, 525 U.S. 459 (1999) which holds that dues payments from a recipient which receives federal funds are insufficient to render the recipient of such dues subject to Title IX. Instead, the government's enforcement power under Title IX may only be exercised against a funding recipient and does not extend to parties outside the scope of this power. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 641 (1999). Thus, the irony underlying this action is that Petitioners have no valid

adopted and applied the three-prong test derived from a 1979 Department of Health, Education and Welfare Title IX Policy Interpretation to evaluate whether Respondents were "effectively accommodating" Petitioners' athletic interests and abilities.[5] *See id.* at 274, *citing Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, § VII.C.5.a, 44 Fed.Reg. at 71,418 (Dec. 11, 1979). (See also Appendix C, Petition for Cert., pp. 77a-78a.) Relying upon *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993) and *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993), the court held that Petitioners bore the burden of proving statistical disparity under subsection (1) of this test, as well as the burden of establishing that

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basis to assert a Title IX against the KHSAA in the first instance because the KHSAA is not a federal fund recipient.

[5] The three-prong Title IX compliance analysis adopted by the Sixth Circuit is as follows:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex;

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. *Id.* at 274 (See Appendix C, Petition for Cert., pp. 77a-78a.)

their interests were not being met by Respondents' existing athletic program under subsection (3). *Id.* at 275. (See Appendix C, Petition for Cert., pp. 78a-79a.) Because the District Court had not examined Petitioners' Title IX claim under this analysis, the Sixth Circuit remanded the case for further consideration. *Id.* at 275. (See Appendix C, Petition for Cert., p. 80a.) The court's decision in this regard was largely influenced by counsel's representation during oral argument that they could establish that females in Kentucky participate in interscholastic athletics at a lower percentage than males, even though there was no evidence in the record to support this representation. *See id.* at 275, n.8. (See Appendix C, Petition for Cert., p. 78a, n.8.) Further, as discussed below, the Sixth Circuit also directed the District Court to consider on remand the impact of a 1995 amendment to Ky.Rev.Stat.Ann. § 156.070(2)(a) (Michie 1996) and KHSAA Bylaw 40 on Petitioners' remaining claims. *See Horner I,* 43 F.3d at 275, n.10. (See Appendix C, Petition for Cert., p. 78a, n.10.)

D. Respondents' Sanctioning Of Girls' Fast-Pitch Softball

Before the Sixth Circuit filed its decision in *Horner I,* the Kentucky General Assembly amended Ky.Rev. Stat.Ann. § 156.070(2)(a) (Michie 1996) to require the State Board or its designated agent to assure that secondary schools which sponsor a sport that is similar to a sport for which National Collegiate Athletic Association ("NCAA") member schools offer a scholarship be

required to sponsor such a similar sport as well.[6] (Petitioners' counsel later claimed to be both the driving force as well as the ghost writer of this statutory amendment.) In response to this statutory mandate, the KHSAA amended its Bylaw 40 for the 1994-1995 school year to require that its member schools which offered the sport of girls' slow-pitch softball also sponsor a girls' fast-pitch softball team.[7]

The KHSAA sponsored its first state tournament for fast-pitch softball in the Spring of 1995.[8] However, due to

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[6] Ky.Rev.Stat.Ann. § 156.070(2)(a) (Michie 1996) provides:

> The state board or its designated agency shall assure through promulgation of administrative regulations that if a secondary school sponsors or intends to sponsor an athletic activity or sport that is similar to a sport for which National Collegiate Athletic Association members offer an athletic scholarship, the school shall sponsor the athletic activity or sport for which a scholarship is offered. The administrative regulations shall specify which athletic activities are similar to sports for which National Athletic Association members offer scholarships.

[7] The 1994-1995 version of KHSAA Bylaw 40 provided as follows:

> If a member school sponsors or intends to sponsor an athletic activity that is similar to a sport for which NCAA members offer an athletic scholarship, the school shall sponsor the athletic activity or sport for which the scholarships are offered. The athletic activities which are similar to sports for which NCAA members offer scholarships are: Girls fast pitch softball as opposed to slow pitch.

[8] With the exception of Whitelock, all of the Petitioners were still in school subsequent to the amendment of Bylaw 40. Horner subsequently graduated and has participated in

dissatisfaction with the 1994-1995 version of Bylaw 40 which dictated that its member schools must offer the sport of girls' fast-pitch softball if the school fielded a slow-pitch softball team, the KHSAA further amended Bylaw 40 for the 1995-96 school year to require only that its member participating in slow-pitch softball offer fast-pitch softball if sufficient interest in the sport existed at the particular school.[9]

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intercollegiate softball at the University of Kentucky. Another Petitioner, Juliana Brown, did not participate in interscholastic softball at her high school (Jeffersontown High School), despite the fact that the school fielded a fast-pitch softball team. The remaining Petitioner, Jacqueline Elston, participated on the DuPont Manual High School fast-pitch softball team for at least one season and possibly two.

[9] The 1995-1996 amendment to KHSAA Bylaw 40 provided as follows:

> To qualify as having "sponsored" a sport, a school must be able to demonstrate the following:
>
> (1) If similar versions of a particular sport exist and there are differences in the scholarship opportunities at the NCAA level in that sport, a survey must be taken of the student population at reasonable times and places to determine the level of interest in the sport(s).
>
> (2) If said survey reveals sufficient interest to field the normal squad required for play in the particular sport and if any version of the sport is to be played, the school shall make facilities, staff, and other allowances to properly field a team in the version of the sport for which the NCAA members offer scholarships.

As noted above, school "sponsorship" and KHSAA "sponsorship" of a particular sport are different concepts.

Petitioners failed to take any discovery following remand. In fact, Petitioners' only proof was an affidavit of counsel with attached statistics purporting to represent participation rates of males and females in high school interscholastic sports in Kentucky. The statistics were deficient in a number of respects. However, it is not necessary to discuss those defects here. Petitioners' counsel apparently believed nothing more was necessary to prove a Title IX violation or an entitlement to compensatory damages. It is undisputed that Petitioners produced no further evidence in support of their claims. For example, Petitioners offered no evidence to substantiate that the interests and abilities of female student athletes at their respective schools were not being met by existing athletic programs. Instead, Petitioners chose to rely on their mistaken interpretation of *Horner I.*

E. The District Court's Second Grant Of Summary Judgment

After Petitioners were allowed sufficient time to further develop the record (but having failed to do so), the KHSAA again moved for summary judgment on the ground that Petitioners' claims for declaratory and injunctive relief were rendered moot by the amendment to Ky.Rev.Stat.Ann. § 156.070(2)(a) (Michie 1996). The KHSAA further established that Petitioners were not entitled to pursue their claim for compensatory damages because they had failed to present any evidence of intentional discrimination. Finally, the KHSAA established that Petitioners had failed to produce any evidence under subsection (3) of the *Horner I* Title IX compliance analysis that would support a finding that their athletic interests

and abilities were not being met by existing sport programs.

On January 17, 1997 the District Court again sustained the KHSAA's Motion for Summary Judgment, finding that all of Petitioners' remaining claims were moot. Regarding Petitioners' monetary damage claim, the court held that they had failed to offer any proof of intentional discrimination on the part of Respondents. The District Court denied Petitioners' motion to alter, amend or vacate its decision on September 30, 1997.

F. The Sixth Circuit's Holding On Petitioners' Second Appeal

Petitioners again sought appellate review of the District Court's holding. On March 20, 2000, the Sixth Circuit affirmed the District Court's decision in *Horner v. Kentucky High School Athletic Ass'n*, 206 F.3d 685 (6th Cir. 2000) ("*Horner II*"). (See Appendix A, Petition for Cert., p. 1a.)[10] The primary holding of *Horner II* is that, based on the record, Petitioners failed to establish a *prima facie* showing that Respondents had violated Title IX. *Id.* at 696. (See Appendix A, Petition for Cert., pp. 26a-27a.) In addition, the court found that, even if Petitioners had established a *prima facie* showing of a Title IX violation, they still could not seek to recover compensatory damages due to their failure to produce evidence of intentional discrimination, regardless of the standard applied to such claims. *Id.* at 696-697. (See Appendix A, Petition

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[10] At no time during the pendency of this action did Petitioners seek expedited consideration of their claims.

for Cert., pp. 27a-29a.) Finally, the court held that it was immaterial whether Respondents' conduct was scrutinized under a "discriminatory animus" or "deliberate indifference" standard because Petitioners' proof failed to satisfy either standard. *Id.* at 696-697. (See Appendix A, Petition for Cert., pp. 27a-28a.)

G. Summary Of Petitioners' Arguments

Petitioners challenge the ruling below on three separate grounds. First, they argue that the Sixth Circuit erred in its holding that they had failed to establish a *prima facie* violation of Title IX. Second, Petitioners assert that *dicta* contained in *Horner II* (which suggests that when a gender-neutral policy is challenged under Title IX, a plaintiff must show discriminatory animus prior to seeking recovery of compensatory damages) is in direct conflict with the holdings of *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). Finally, Petitioners challenge *dicta* in *Horner II* that, under the facts of this case, they could not recover compensatory damages regardless of whether a discriminatory animus or deliberate indifference standard was employed. For the reasons discussed below, the KHSAA respectfully submits that Petitioners' claims are incorrect and, in any event, do not merit review by this Court.

REASONS FOR DENYING THE WRIT

A. PETITIONERS FAILED TO ESTABLISH A *PRIMA FACIE* VIOLATION OF TITLE IX.

Petitioners argue that the Sixth Circuit erred in holding they had failed to establish a *prima facie* violation of Title IX. Specifically Petitioners assert that *Horner I* held there were material issues of fact which precluded summary judgment on their Title IX claim. Petitioners then assert that they were not required to submit any additional evidence in support of their claims on remand. Petitioners' argument fails because it wholly ignores the fact that the purpose of remand was to allow them the opportunity to offer evidence under subsections (1) and (3) of the Title IX compliance analysis adopted in *Horner I* and to further allow the District Court the opportunity to consider the impact of Ky.Rev.Stat.Ann. § 156.070(2)(a) on their Title IX claim.

In *Horner I*, the Sixth Circuit focused on the absence of evidence in the record under subsections (1) and (3) of the Title IX compliance analysis on which Petitioners bore the burden of proof. *See id.*, 43 F.3d at 276 ("Throughout the majority opinion appear comments on the absence of evidence in the record on pivotal issues.") (Batchelder, J., dissenting). (Appendix C, Petition for Cert., p. 83a.) Out of an abundance of leniency, the Sixth Circuit remanded the District Court's initial decision based upon Petitioners' improper recitation of statistical evidence that was not properly before the court. *See id.*, 43 F.3d at 275, n.8. (Appendix C, Petition for Cert., p. 78a.) In spite of this undeserved second bite at the apple, Petitioners

again failed to produce evidence to withstand summary judgment.

Horner II does nothing more than recognize Petitioners' failure to meet their burden following remand.

> In sum, the *Horner I* panel did not hold that Plaintiffs made out a prima facie case of a Title IX violation, but merely held that Plaintiffs established the first element of their prima facie case. Notably, the *Horner I* panel specifically advised Plaintiffs of the proofs necessary to prevail on their Title IX claim, and granted a remand for further development of the record. Notwithstanding, upon renewed motions for summary judgment by Defendants, other than proof of statistical disparity, Plaintiffs still failed to offer any additional evidence that Title IX's equal opportunity mandate had been violated, let alone intentionally violated.

Horner II, 206 F.3d at 696. (Appendix A, Petition for Cert., pp. 26a-27a.)

In spite of the clear dictate of *Horner I* that Petitioners bore the burden under subsection (3) of the Title IX compliance analysis, Petitioners failed to offer any evidence that their interests were not being effectively accommodated by existing athletic programs at their respective schools. *Horner II*, 206 F.3d at 696. (Appendix A to Petition for Cert., pp. 26a-27a.) This failure was fatal to Petitioners' Title IX claim because the assertion that their individual interests – as opposed to the interests of all

females enrolled in their respective schools –[11] were not being met was insufficient to satisfy their burden of proof under subsection (3). *See Horner I*, 46 F.3d at 275, n.9 (holding that an institution is not required to field a team in response to, e.g., the "pleas of one talented softball player," if sufficient numbers of individuals to form teams to compete do not exist), *citing Roberts, supra*, 998 F.2d at 831, n.10 and *Cohen, supra*, 991 F.2d at 898. (See Appendix C, Petition for Cert., p. 79a.)

In addressing the proper application of the summary judgment principle under Rule 56(c), Fed.R.Civ.P., this Court has stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear

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[11] In *Horner I*, the Sixth Circuit failed to explain how the Department of Health, Education and Welfare's Title IX Policy Interpretation (which addresses intercollegiate athletic equity issues at the individual educational institution level) is applicable for measuring compliance with Title IX by a high school athletic association with 286 members which includes private and parochial schools that are clearly not subject to Title IX. The KHSAA submits that Title IX compliance can only be measured at the individual school level (assuming the school is a federal funding recipient subject to Title IX) and not at the level of a voluntary state athletic association. Otherwise, a complaining party could use evidence gathered from all member schools, including private and parochial schools (i.e., evidence of statistical disparity) as evidence of a violation when, in fact, statistical evidence from the individual student's school could establish Title IX goals were being met.

> the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.[12]

Celotex Corp. v. Catrett, 477 U.S. 316, 322-23 (1986). The Sixth Circuit's holding in *Horner II* is no more than a straight-forward application of this summary judgment standard. In summary, there are no important issues of federal policy or question of law inherent in the Sixth Circuit's affirmance of summary judgment in favor of Respondents which merit the review of this Court. *See General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938) (holding writ of *certiorari* will not be granted merely to review the evidence or inferences drawn from it). Petitioners simply failed to carry their burden of proof under *Horner I*. Further, the holding of this case is specific to the four remaining Petitioners. Reversal and remand would have no impact on any other parties or subsequent actions. The Petition, therefore, should be denied. *See Vasquez v. United States*, 459 U.S. 975, 977 (1981) ("[i]t is often appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases"); *Gen.*

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[12] Petitioners attempted to argue below that summary judgment was improper because the KHSAA had not established under subsection (2) of the *Horner I* Title IX compliance analysis a history and continuing practice of athletic program expansion. However, it is clear that any issues concerning subsection (2) of the *Horner I* analysis were rendered immaterial due to Petitioners' failure to demonstrate the existence of a material issue of fact under subsection (3).

Council on Fin. and Admin. of the United Methodist Church v. Superior Court of California, 439 U.S. 1355, 1374 (1978) (in cases depending upon particular facts, only a "marked departure by a lower court in the application of established law" will justify the grant of certiorari).

B. *DICTA* CONTAINED IN *HORNER II* WHICH SUGGESTS THAT A TITLE IX PLAINTIFF WHO CHALLENGES A GENDER-NEUTRAL POLICY UNDER A DISPARATE IMPACT THEORY MUST SHOW DISCRIMINATORY ANIMUS AS A PREREQUISITE TO RECOVERY OF MONETARY DAMAGES DOES NOT CONFLICT WITH THE TITLE IX PRECEDENT OF THIS COURT.

Because the Sixth Circuit concluded in *Horner II* that Petitioners had failed to establish a *prima facie* violation of Title IX, it did not decide the issue of what proof would have been necessary for them to recover compensatory damages. However, Petitioners argue that *dicta* contained in *Horner II* which suggests that a Title IX plaintiff who challenges a gender-neutral policy on disparate impact grounds would have to prove discriminatory animus as a prerequisite to recovery of monetary damages directly conflicts with the deliberate indifference standard for recovery of monetary damages endorsed by this Court in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). Petitioners are incorrect in this assertion.

The ability of a claimant to recover monetary damages for violation of Title IX was addressed in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The

facts of *Franklin* involved a student's claim that school officials took no action to stop the sexual advances of one of her teachers despite their knowledge of such conduct. The district court dismissed the student's claim on the ground that monetary damages are not recoverable under Title IX. The Eleventh Circuit affirmed the district court's holdings. This Court reversed, holding that a monetary damage remedy does exist under Title IX in limited cases where evidence of intentional discrimination is presented. *Id.* In reaching this decision, this Court noted the general rule that, absent clear direction to the contrary from Congress, federal courts have the power to award any appropriate relief in a cause of action brought pursuant to a federal statute. *Id.* at 71.

However, *Franklin* also acknowledged that remedies under statutes such as Title IX passed pursuant to Congress' Spending Clause authority are limited in cases involving unintentional discrimination. *Id.* at 74. The rationale for not permitting monetary damages under Spending Clause statutes for unintentional violations is that the receiving entity lacks notice of the possibility of a monetary judgment. *Id.* at 74.

Following *Franklin*, this Court in *Gebser, supra*, considered the issue of whether a school district could be held liable for monetary damages under Title IX for the sexual harassment of one of its students by a teacher under circumstances where the district had no knowledge of the harassment. Rejecting proposed liability standards of *respondeat superior* and constructive notice, *Gebser* held that, in order to recover monetary damages, a plaintiff must show that an official with the authority to address such harassment has actual knowledge of the harassment

and responds to the situation in a deliberately indifferent manner by refusing to take appropriate action. *Id.*, 524 U.S. at 290. In *Davis*, the deliberate indifference standard was merely extended to apply to Title IX actions involving claims of student-on-student sexual harassment.

Davis and *Gebser* hold that an educational institution which receives federal funds can be held liable for compensatory damages for the sexual harassment of a student by either an employee or another student if an appropriate official is aware of the harassment but refuses to respond to the situation in a deliberately indifferent manner. The problem with Petitioners' argument that a deliberate indifference standard should govern their claim for monetary damages is that Title IX athletic equity actions are fundamentally different from actions involving institutional liability for sexual harassment. *See Horner II*, 206 F.3d at 693 (holding that *Franklin*, *Gebser* and *Davis* all address sexual harassment, and are not readily analogous to this action). (See Appendix A, Petition for Cert., p. 16a.) *See also Pederson v. Louisiana State University*, ___ F.3d ___, 2000 WL 713410 (5th Cir. 2000) ("[t]he requirement in the sexual harassment cases – that the academic institution have actual knowledge of the sexual harassment – is not applicable for purposes of determining whether an academic institution intentionally discriminated on the basis of sex by denying females equal athletic opportunity.") *Id.* at 20.

As the Sixth Circuit correctly observed, this case is the Title IX equivalent of *Guardians Ass'n v. Civil Service Com'n of City of N.Y.*, 463 U.S. 582 (1983). *See Horner II*, 206 F.3d at 693. (See Appendix A, Petition for Cert., p. 17a.)

Guardians involved the Title VI claims of black and Hispanic New York City police officers who argued that they had been disparately impacted by the defendants' use of racial-neutral hiring exams. Specifically, the plaintiffs argued that minority police applicants as a group had been hired later than white applicants due their lower scores on non-job related hiring exams. When departmental personnel cut backs occurred, minority officers were laid-off in greater numbers than whites under the police department's "last hired, first fired" lay-off policy.

In *Guardians*, the district court determined that the minority officers had failed to prove discriminatory intent, but that the hiring exams nonetheless violated Title VI due their discriminatory effect on black and Hispanic police officers. The U.S. Court of Appeals for the Second Circuit reversed, holding that the district court erred in holding that Title VI does not require proof of discriminatory intent. This Court granted *certiorari* to address the issue of whether Title VI requires proof of discriminatory intent.

Justice White announced the judgment of the Court in *Guardians* as being that declaratory and injunctive relief could be awarded under Title VI based upon a showing of discriminatory impact, but compensatory relief was not appropriate absent evidence of intentional discrimination. *Id.* Justice White concluded that, in the absence of a showing of discriminatory animus, compensatory relief is not available under Title VI. *Id.*, 463 U.S. at 584.

Like Title IX, Title VI is Spending Clause legislation. *Guardians*, 463 U.S. at 599. Furthermore, the facts of this

case present a situation analogous to that addressed in *Guardians* – a challenge to a facially neutral policy on disparate impact grounds. Finally, like the complainants in *Guardians*, the Petitioners here have failed to present evidence of intentional discrimination.

The only conclusion properly drawn from *Guardians* is that the Sixth Circuit was correct in its evaluation that Petitioners could not recover monetary damages from Respondents even if a *prima facie* showing of Title IX had been made. This case is legally indistinguishable for *Guardians*. The deliberate indifference standard of *Gebser* and *Davis* simply have no application here.

Finally, it appears that only one other federal appellate decision has addressed the standard for recovery of compensatory damages under Title IX in an athletic context. In *Pederson v. Louisiana State University*, ___ F.3d ___, 2000 WL 713410 (5th Cir. 2000), the Fifth Circuit rejected the deliberate indifference standard for such claims and held that the proper test for recovery of monetary damages is whether a recipient intended to treat women differently on the basis of their sex by providing them with unequal athletic opportunity. *Pederson*, 2000 WL 713410 at p. 20. The definition of intentional discrimination adopted by the Fifth Circuit clearly comports with this Court's definition of discriminatory animus. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-270 (1993) (defining discriminatory animus toward women under 42 U.S.C. § 1885(3) as having a purpose that focuses upon women by reason of their sex).

In summary, Petitioners have no argument that the *dicta* of *Horner II* which suggests that a showing of discriminatory animus is the appropriate standard for recovery of monetary damages under Title IX in cases of this nature conflicts with the deliberate indifference standard of *Gebser* and *Davis*. Further, there is no conflict between *Horner II* and the compensatory damage recovery standard adopted by the Fifth Circuit in *Pederson*. Review by this Court is simply not warranted under these circumstances.

C. PETITIONERS FAILED TO PRODUCE ANY EVIDENCE THAT RESPONDENTS INTENTIONALLY DISCRIMINATED AGAINST THEM REGARDLESS OF WHETHER A STANDARD OF DISCRIMINATORY ANIMUS OR DELIBERATE INDIFFERENCE IS UTILIZED.

Petitioners attempt to challenge the *dicta* in *Horner II* which concludes that, even if they had established a *prima facie* violation of Title IX and the correct standard for recovery of compensatory damages were deliberate indifference (as opposed to discriminatory animus), they nonetheless would not be entitled to pursue their damage claim. Petitioners argue that they were entitled to another remand in order to attempt to develop evidence that Respondents were deliberately indifferent in accommodating Petitioners' athletic interests and abilities. As set forth above, the KHSAA disputes that deliberate indifference is the appropriate standard for recovery of compensatory damages in actions challenging a gender-neutral policy under Title IX. However, it is clear that the Sixth Circuit correctly determined that Petitioners could

not satisfy either the deliberate indifference or discriminatory animus standard under the facts of this case.

First, under *Gebser,* liability will not arise under the deliberate indifference standard unless an official who has appropriate authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination and refuses to take action to bring the recipient into compliance with Title IX. *See Gebser,* 524 U.S. at 290. Petitioners have presented no evidence that the membership of the KHSAA had actual knowledge that its 25% rule was disparately impacting the athletic opportunities of female athletes.[13] Absent such knowledge, the KHSAA had no ability to react in a deliberately indifferent manner to whatever obligations, if any,[14] it might have to Petitioners under Title IX.

Morever, prior to *Horner I* the KHSAA had no reason to know that it was even subject to Title IX based upon the theory that it was an indirect recipient of federal funds. While this portion of *Horner I* has been clearly abrogated by *NCAA v. Smith,* 525 U.S. 459 (1999), it is self-

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[13] Petitioners argue that they satisfy the deliberate indifference actual knowledge standard because the KHSAA had actual knowledge that it was not sanctioning girls' fast-pitch softball because of the 25% rule, and that entities subject to Title IX are charged with knowledge of their equal accommodation obligations. This "apathy" standard for recovery of monetary damages advocated by Petitioners more closely resembles a constructive notice or negligence standard – standards which have been clearly rejected by *Gebser* and *Davis* – than that of deliberate indifference.

[14] See footnote 4, *supra.*

evident that the KHSAA could not intentionally violate a statute it had no notice or reason to believe it was subject to in the first instance. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding in 28 U.S.C. § 1983 context that governmental officials are shielded from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights). *See also Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74 (1992) (rationale for not permitting monetary damages under Spending Clause statutes for unintentional violations is that the receiving entity lacks notice of the possibility of a monetary judgment).

Finally, Petitioners could not satisfy the deliberate indifference standard by merely demonstrating that the KHSAA sponsored a state tournament for baseball[15] but not the sport of fast-pitch softball. As recognized in *Horner II*, Title IX does not require the sponsorship of gender-separate teams for all sanctioned sports. *See Horner II*, 206 F.3d at 697. (Appendix A, Petition for Cert., p. 29a.)

As for the discriminatory animus standard, Petitioners produced no evidence that Respondents intended to treat them differently on the basis of their sex by providing unequal athletic opportunity as required by *Pederson, supra*. Likewise, Petitioners did not demonstrate that the 25% rule was adopted for the purpose of focusing upon women and treating them differently by reason of their sex. *Bray v. Alexandria Women's Health Clinic*, 506

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[15] The majority opinion in *Horner II* incorrectly refers to baseball as "boys' fast-pitch softball". In fact, the two sports are different. However, this distinction does not alter the basis for the court's holding.

U.S. 263, 269-270 (1993). Accordingly, the Sixth Circuit correctly concluded that Petitioners did satisfy the discriminatory animus standard.

In summary, under the facts of this case, it does not matter whether a discriminatory animus or deliberate indifference standard is utilized. Petitioners' monetary damage claim fails under either approach. The mere failure to sponsor a state tournament in a given sport due to the existence of a gender-neutral policy, without more, is simply an insufficient reason to seek or recover monetary damages even if a predicate violation of Title IX is established. Here, Petitioner not only failed to offer proof of discriminatory animus or deliberate indifference, they failed to offer proof of any underlying Title IX violation. Accordingly, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent Kentucky High School Athletic Association respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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